MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NUMBER: ARO-15-638

STATE OF MAINE v. CHAD LAGASSE

ON APPEAL FROM THE
AROOSTOOK COUNTY SUPERIOR COURT (CARIBOU)

APPELLANT'S BRIEF

Christopher J. Coleman, Esq.

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NATURE OF PROCEEDING

This is a criminal case in which Defendant bases his claim of reversible error at the trial level on the ground that his arrest by the Caribou Police Department was without probable cause and in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and under Article I, § 5 of the Constitution of Maine. From that premise of an initial illegal arrest, he contends the seized drugs from his person were the "fruit of the poisonous tree" and should have been suppressed as evidence at trial.

On August 13, 2014 the Aroostook County Superior Court denied Defendant's Motion to Suppress found in a search conducted pursuant to his arrest. Defendant asks this Court to overturn that order and grant Defendant's motion to suppress and to vacate his subsequent conviction for Aggravated Trafficking of Scheduled Drugs (Class A).

The Defendant was charged with a four felony count indictment alleging he committed the crimes of Robbery (Class A), Theft by Unauthorized Taking or Transfer (Class C), Illegal Possession of a Firearm (Class C) and Aggravated Trafficking in Scheduled Drugs (Class A).

Defendant pled not guilty to all counts. At trial by jury he was acquitted of all but the count of Aggravated Trafficking in Scheduled Drugs. Judgement was entered November 13, 2015.

QUESTION PRESENTED

Did Caribou Police Officers collectively have information to justify a probable cause determination that allowed them to arrest defendant without a warrant for the Class A crime of Robbery?

SUMMARY OF ARGUMENT

No. The Caribou Police made their probable cause determination based solely on the word of a source who had a conviction for making an unsworn false statement to police in the past and they failed to corroborate his information which was only given with the perceived expectation of leniency regarding his own crimes.

Defendant bases his claim of reversible error at the trial level on the ground that his arrest by an officer of the Caribou Police Department was without probable cause and in violation of his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and under Article I, § 5 of the Constitution of Maine. From that premise of an initial illegal arrest, Defendant contends the seized drugs from his person

were the "fruit of the poisonous tree" and should have been suppressed as evidence at trial.

SUMMARY OF FACTS

On January 3, 2013 Eric Mowatt and another individual robbed Holly Haney at her home in Caribou, Maine. Both robbers wore face masks and carried pistols.[1] The men first demanded drugs from Ms. Haney[2] and then Mr. Mowatt took money from the safe in her bedroom telling her she would get it back if she could find pills within two days.[3] The men left and Holly Haney called the police.

Ms. Haney told the police that she recognized one of the men as Eric Mowatt by his voice and affect even though he was wearing a mask.[4] She did not recognize the other robber who mostly remained silent.[5]

Mr. Mowatt was familiar to the Caribou Police in part because of his late 2011 conviction for unsworn falsification.[6] Officer Cummings quickly made contact with Mr. Mowatt who reluctantly agreed to meet at a neutral location.[7] He immediately denied any involvement in the robbery.[8] Mr.

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[1] Trial Transcript, Volume 1 of 2, Page 38 line 14-25 and Pg. 39 lines 1-3.
[2] Tri. Tr., Vol. 1 of 2, Pg. 39 line 18-19.
[3] Tri. Tr., Vol. 1 of 2, Pg. 43 line 1-7.
[4] Tri. Tr., Vol. 1 of 2, Pg. 38 line 1-6.
[5] Tri. Tr., Vol. 1 of 2, Pg. 39 line 9-12.
[6] Tri. Tr., Vol. 1 of 2, Pg. 115 lines 19-21 and Tri. Tr., Vol. 1 of 2, Pg. 152 line 5-13.
[7] Tri. Tr., Vol. 1 of 2, Pg. 71 lines 14-24.
[8] Tri. Tr., Vol. 1 of 2, Pg. 72 line 11.

Mowatt was told that he was identified by the victim Holly Haney.[9] He was subsequently arrested and taken to the Aroostook County Jail in Houlton, Maine.[10]

On January 3rd or January 4th, Officer Dube searched the home Mr. Mowatt shared with his fiancé's and the search yielded a pistol matching the guns implicated in the crime and a large amount of wet money.[11] Mr. Mowatt later testified that he had hidden the money underneath a dumpster after the robbery and it was established that there was snow on the ground.[12]

On January 4th, Officer Keith Ouellette and Agents Craig Holder and Peter Johnston found a black face mask[13] and ammunition[14] for the aforementioned pistol in the apartment of Mr. Matthew Salch a sometimes roommate of Mr. Mowatt.

On January 6th, Mr. Mowatt contacted Officer Cummings in order to discuss possible consideration for information about the robbery. Officer

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[9] Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 32 lines 16-22
[10] Tri. Tr., Vol. 1 of 2, Pg. 130 line 8-9.
[11] Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 25 line 16 through Pg. 27 line 23. See also Pg. 35 lines 8-21.
[12] Tri. Tr., Vol. 1 of 2, Pg. 129 line 1-6.
[13] Tri. Tr., Vol. 1 of 2, Pg. 93 line 7-11.
[14] Tri. Tr., Vol. 1 of 2, Pg. 94 line 2-6

Mark Gahagan and Officer Matthew Cummings went to the jail to interview Mr. Mowatt. Initially Mr. Mowatt refused to admit to the crime. [15]

When advised by the officers that they didn't believe him and that they already had enough evidence to convict him, Mr. Mowatt began to beg for some type of deal or consideration to help him get out of jail time. [16] Mr. Mowatt testified that he only decided to tell the police about Defendant when they suggested that someone close to him might be charged as his accomplice instead.[17]

On January 7th the Caribou Police set up a monitored phone call between Mr. Mowatt and the Defendant. Defendant refused to implicate himself and hung up on Mr. Mowatt.[18]

Even after implicating the Defendant and being released on bail Mr. Mowatt continued to deceive law enforcement about the location of the money, which he claims to have spent on drugs while out on bail.[19]

Officer Cummings later testified at Defendant's trial that he never independently corroborated Mr. Mowatt's accusation of the Defendant.[20]

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[15] Tri. Tr., Vol. 1 of 2, Pg. 144 line 17-20.
[16] Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 40 lines 23-25 and Pg. 41 line 1.
[17] Tri. Tr., Vol. 1 of 2, Pg. 131 lines 12-17 and Pg. 132 lines 9-10.
[18] Tri. Tr., Vol. 1 of 2, Pg. 161 line 8-10; Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 47 lines 7-9.
[19] Tri. Tr., Vol. 1 of 2, Pg. 143 lines 2-12.
[20]Tri. Tr., Vol. 2 of 2, Pg. 112 lines 11-19 and Pg. 127 Lines 18-25.

Mr. Mowatt made bail and was released from the Aroostook County Jail. On January 19th, he informed the police that he had just seen the Defendant at the Family Dollar Store in Fort Fairfield, Maine. According to Mr. Mowatt, the Defendant was driving a silver Mazda Protégé bearing a Maine Transit Plate. Officer Cummings was unable to locate the car. Officer Cummings made it known to other officers in the course of a conversation at their shift change, including Officer Douglas Bell[21], that they were to arrest the Defendant for robbery.[22]

On January 20th, Officer Douglas Bell of the Caribou Police Department saw a silver Mazda Protégé headed toward the Van Buren Road on Bennett Drive in Caribou, Maine. At the intersection of those roads the car turned right and Officer Bell followed in his cruiser. At that point, the Mazda could have continued on straight to a traffic light, or taken the right-turn-only lane to go south on Route 1. Officer Bell described the car's turn to the right as a "hard" turn, made without use of a turn signal. Officer Bell radioed dispatch and they confirmed that he was to stop the silver Mazda and apprehend the Defendant on sight. Officer Jason Matheson was dispatched as backup for Officer Bell. Officer Bell followed

[21] Motion to Suppress Hearing Transcript. Testimony of Officer Douglas Bell. Pg. 5 lines 2-21.
[22] Motion to Suppress Hearing Transcript. Testimony of Officer Douglas Bell. Pg. 6 lines 11-16.

the Mazda south on Route 1 until it turned right on to Washington Street. As the Mazda approached Main St., Officer Bell used his blinkers to effect a "high risk felony stop[23]". The Mazda pulled over.

Officer Bell did not immediately approach the Mazda. He parked his cruiser at a 45 degree angle to the Mazda, drew his weapon and ordered the Defendant to get out of the Mazda and place his hands on the roof of the car. The Defendant complied. Officer Bell identified him as Chad Lagasse.[24]

Officer Bell immediately handcuffed the Defendant and put him in the back of his police cruiser and shortly Officer Matheson arrives.[25] The Defendant was taken out of the cruiser to have his handcuffs replaced with hinge handcuffs after his car is searched because Defendant was struggling.[26] Defendant was put into Officer Matheson's cruiser.[27] Later the officers notice Defendant struggling again and find him attempting to conceal a bag of pills presumed to have been hidden in his pants.[28] Further several pills were found on the ground near where Defendant was.

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[23] Motion to Suppress Hearing Transcript. Testimony of Officer Douglas Bell. Pg. 12 line 4.
[24] Motion to Suppress Hearing Transcript. Testimony of Officer Douglas Bell. Pg. 14 line 20-25 and Pg. 15 lines 1-8.
[25] Tri. Tr., Vol. 1 of 2, Pg. 171 lines 24-25.
[26] Tri. Tr., Vol. 1 of 2, Pg. 172 lines 19-24.
[27] Tri. Tr., Vol. 1 of 2, Pg. 176 lines 8-16.
[28] Tri. Tr., Vol. 1 of 2, Pg. 178 lines 7-11.

ARGUMENT

A. THE OFFICERS LACKED PROBABLE CAUSE TO ARREST THE DEFENDANT

1. THE TOTALITY OF CIRCUMSTANCES APPROACH

In Maine "a law enforcement officer may arrest without a warrant... [a]ny person who the officer has probable cause to believe has committed or is committing" any felony. 17-A M.R.S.A. §15(1)(A)(2). Probable cause only exists when "facts and circumstances within the knowledge of the police and of which there was reasonably trustworthy information would warrant a prudent and cautious person to believe that the arrestee had committed the crime. The information determining the existence of probable cause ... includes all the information known to the police." *State v. Candage*, 549 A.2d 355, 360 (Me. 1988). Probable cause is only established when, "given all the circumstances ... *including the veracity and basis of knowledge of persons supplying hearsay information*, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Wright*, 2006 ME 13, ¶ 8, 890 A.2d 703, 705 (quotation marks omitted)(emphasis added). Probable cause is based on an objective standard. *State v. Enggass*, 571 A.2d 823, 825 (Me. 1990). It is not based on the subjective beliefs of the arresting officer but, rather, whether there is reasonably trustworthy information known to the police

collectively that would lead an officer of ordinary prudence and caution to believe there was probable cause. *State v. Heald*, 314 A2.d 820, 825 (Me. 1990).

In 1983 the United States Supreme Court wisely ruled that when making determinations of probable cause one must apply the "totality-of-the-circumstances approach" articulated in *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) See also *State v. Knowlton*, 489 A.2d 529, 531-33 (Me.1985) (adopting Supreme Court's holding in *Illinois v. Gates*).

There is a long line of cases examining the probable cause determinations based on information provided by informants. Over the decades a remarkably structured and categorized approach to such cases emerged. The United States Supreme Court said of this pre-*Gates* period that "the Fourth Amendment was understood by many courts to require strict satisfaction of a "two-pronged test" whenever an affidavit supporting the issuance of a search warrant relies on an informant's tip. It was thought that the affidavit, first, must establish the "basis of knowledge" of the informant the particular means by which he came by the information given in his report; and, second, that it must provide facts establishing either the general "veracity" of the informant or the specific "reliability" of his report in

the particular case. *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). Instead probable cause is now to be determined in a "'in a common sense and realistic fashion" and those "[t]echnical requirements of elaborate specificity... have no proper place in this area." *State v. Lutz*, 553 A.2d at 659 (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965)).

Probable cause determinations under the *Gates* approach are firmly rooted in common sense. While review of pre-*Gates* case law may be useful the intricate set of categories and exceptions are not considered determinative as they once were. To find an adequate factual basis for probable cause to arrest someone without a warrant in Maine there must be facts and circumstances showing a fair probability that a felony has been committed.

2. THE INFORMANT DID NOT MAKE A STATEMENT AGAINST PENAL INTEREST

It is true that admissions of their own criminal activity *may* give informants additional credibility. *State v. Dignoti*, 682 A.2d 666 (Me.1996). *State v. Knowlton*, 489 A.2d 529 (Me., 1985). However, Mr. Mowatt's statements can hardly be characterized as being against his penal interest. Mr. Mowatt was seeking a *quid-pro-quo* from the police officers

interrogating him. Additionally, when Mr. Mowatt made his statements he knew he was not really giving the police *new* information about his own criminal acts. They already had a strong identification of him by Holley Haney and he knew it.[29] The police had Mr. Mowatt's gun and a bag of wet money.[30] Mr. Mowatt even testified that he only decided to tell the police about Defendant when they suggested his fiancé could be charged as his accomplice.[31]

The State will likely urge a selective reading of the facts from the investigation, such as Mr. Mowatt's ostensible statements against his penal interest, to lead this Court to find there was a proper basis for probable cause. But this Court has said that the "[p]olice are expected to notice factual evidence showing a suspect's innocence of criminality as much as they should be vigilant in seeking evidence of guilt. *State v. Garland*, 482 A.2d 139, 144 (Me., 1984). Meaning that not only is myopically focusing on one aspect of the facts contrary to the totality of circumstances approach, it is inconsistent with responsible police work.

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[29] Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 32 lines 16-22

[30] Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 25 line 16 through Pg. 27 line 23.

[31] Tri. Tr., Vol. 1 of 2, Pg. 131 lines 12-17 and Pg. 132 lines 9-10.

In *State v. Rabon,* the Court distinguished between the informant who furnishes information as part of a perceived *quid-pro-quo* with the police and an informant who makes a statement against penal interest. In *Rabon* the Court points out that the informant was "not a disinterested 'citizen informant,' but is instead a 'confidential informant' who 'disclose[d] information to the authorities in hopes of lessening his or her own exposure to criminal sanctions.' *State v. Perrigo*, 640 A.2d 1074, 1076 (Me.1994). 'Courts are much more concerned with veracity when the source of the information is an informant from the criminal milieu rather than an average citizen who has found himself in the position of a crime victim or witness' 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.4 at 219 (4th ed.2004). In addition, the affidavit does not report that the informant provided any information against the informant's own penal interests, which is another basis on which to infer the reliability of information provided by an informant. See *State v. Dignoti*, 682 A.2d 666, 670 (Me.1996)." *State v. Rabon*, 2007 ME 113, 930 A.2d 268 (Me., 2007).

Even though the informant in *Rabon* was giving the police information he could have only garnered if he was involved in the local drug trade it was not considered a statement against his penal interest because he was on bail for a separate crime informing in hopes of receiving "prosecutorial

consideration if any information provided is helpful in a drug trafficking case." *State v. Rabon*, 2007 ME 113, 930 A.2d 268 (Me., 2007).

While Mr. Mowatt was supposedly informing on an alleged accomplice not perpetrators of other crimes the same skepticism of someone from the criminal milieu who is facing criminal charges as was found in *Rabon* is appropriate in the instant case under the totality of circumstances approach. This Court need not formalistically consider Mr. Mowatt's alleged statements against his penal interest as a basis to infer probable cause from when there are such strong common sense reasons not to. Namely that he was desperately seeking to better his already very grim penal situation while in custody.

3. IF THE INFORMANT MADE A STATEMENT AGAINST PENAL INTEREST IT DOES NOT ESTABLISH PROBABLE CAUSE UNDER THE *GATES* APPROACH

Mr. Mowatt was an unreliable informant. He was seeking a deal to diminish his own punishment. [32] He had a prior conviction for unsworn falsification[33] and a subsequent one for falsifying physical evidence.[34] He admitted that he decided to tell the police about Defendant only when they

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[32] Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 40 lines 23-25 and Pg. 41 line 1.
[33] Tri. Tr., Vol. 1 of 2, Pg. 115 line 19-21.
[34] Tri. Tr., Vol. 1 of 2, Pg. 152 line 5-13.

suggested his fiancé could be charged as his accomplice.[35] Mr. Mowatt was unable to corroborate his story regarding the Defendant's involvement. [36] The police admit they were unable to corroborate Mr. Mowatt's story. [37]

Presumably the State will rely heavily on *United States v. Harris*, 1971, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723. And its Maine progeny *State v. Appleton*, 297 A.2d 369 (Me. 1972) for the proposition that "[p]eople do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility-sufficient at least to support a finding of probable cause to search." *State v. Appleton*, 297 A.2d 363 (Me., 1972) (Quoting *United States v. Harris*, 1971, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723). It is true that admissions of their own criminal activity *may* give informants additional credibility. However under the totality of circumstances approach such a fact is not necessarily determinative. Only if, given all the circumstances known to the police, there is a fair probability that Defendant committed a felony has their burden been met. The line of cases dealing with statements against penal interest as a means of establishing probable

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[35] Tri. Tr., Vol. 1 of 2, Pg. 131 lines 12-17 and Pg. 132 lines 9-10.
[36] Tri. Tr., Vol. 1 of 2, Pg. 161 line 8-10. Motion to Suppress Hearing Transcript. Testimony of Officer Matthew Cummings. Pg. 47 lines 7-9.
[37]Tri. Tr., Vol. 2 of 2, Pg. 127 Lines 18-25.

cause are almost uniformly illicit substance consumers informing on their suppliers. *Harris* and *Appleton* are no exception to this rule. There is generally some direct corroboration in the form of a controlled purchase or holistic corroboration by getting the same information from several independent informants. None of the cases involve an informant in police custody with a history of convictions for deceiving the police. In each case the both the Supreme Court and the Supreme Judicial Court of Maine are able to identify some independent corroboration for the accusations of unreliable informants.

In *Harris* probable cause was found where the Defendant "had a reputation with the investigator for over four years as being a trafficker in nontaxpaid distilled spirits; *during that time the local constable had located illicit whiskey in an abandoned house under respondent's control*; on the date of the affidavit the affiant had received sworn oral information from a person whom the affiant found to be a prudent person, and who feared for his life should his name be revealed, that the informant had purchased illicit whiskey from the residence described, for a period exceeding two years, most recently within two weeks; that the informant asserted he knew of another person who bought such whiskey from the house within two days; that he had personal knowledge that such whiskey was consumed in a

certain outbuilding; and that he had seen respondent go to another nearby outbuilding to obtain whiskey for other persons." *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). (emphasis added)

While the Court recognized that the confidential informant in *Harris* did have a strong basis of knowledge and his credibility was bolstered by his statement against his penal interest the ruling also relied on the fact that "Constable Johnson's prior seizure ... [indicated] ... that the defendant had previously trafficked in contraband." *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). A fact the Court acknowledged as corroboration for the affiant's claim that the defendant had a reputation as a bootlegger. The record in the instant case shows no corroboration for Mr. Mowatt's claim that the Defendant committed the crime of armed robbery.

In *Appleton* a "reliable co-operating citizen" told the officer that he had purchased some methamphetamine in a nearby apartment and that he saw more in the apartment that day. *State v. Appleton*, 297 A.2d 363 (Me., 1972). The co-operating citizen then brought the officer some methamphetamine to be tested, the test was administered by the officer and the result was positive. The co-operating citizen claimed to have procured the methamphetamine from the apartment. The co-operating citizen also bought some methamphetamine on another day under direction

from the police. The co-operating citizen informed the police that a woman had moved into the apartment with Mr. Appleton. This was checked out with the YWCA where she previously lived. She had not been seen at the YWCA since before the co-operating citizen reported her living with Mr. Appleton. She was observed by the police at the apartment. Furthermore the police had worked with this co-operating citizen in the past to make purchases of LSD and presumably found him honest.

Mr. Mowatt differs from the informant from *Appleton* in several key respects. First, the informant in *Appleton* is described as a co-operating citizen not the chief suspect in an armed robbery investigation. However, it is important to note that the "informant's reliability is not, under the *Gates* test, to be considered as an element separate and apart from the general inquiry whether the affidavit as a whole establishes a sufficient basis for the complaint justice to find probable cause." *State v. Knowlton*, 489 A.2d 529 (Me., 1985). There are some common sense reasons to have serious doubts about Mr. Mowatt's information in ways the Court did not in *Appleton*. There is no record of the informer in *Appleton* begging for consideration before he provided information. The informant in *Appleton* did not have a conviction for deliberately trying to deceive the authorities.

Second, the police were able to corroborate several aspects of the informer's story in *Appleton*. The informer in *Appleton* was able to bring the police physical evidence to corroborate his story. The police concluded the informant had likely been in the apartment by the fact that he was able to identify someone as living there and the police later independently confirmed she was in fact living there. The police had him purchase Methamphetamine from the house and bring it to them for testing. To their credit the police tried to corroborate Mr. Mowatt's story by listening in on a call from Mr. Mowatt to the Defendant. They failed. The Defendant refused to confirm any involvement in an armed robbery. Furthermore the lead investigating officer admitted that there was no independent corroboration of Mr. Mowatt's word. [38]

The uncorroborated word of a man in police custody, known by the officers to be unreliable, spinning a prevaricating tale and seeking to curry consideration for a more lenient penalty, does not supply probable cause for a warrantless felony arrest under 17-A M.R.S.A. §15(1)(A)(2). Mr. Mowatt's uncorroborated allegations do not show a fair probability that the Defendant committed a felony armed robbery. The prevaricating manner of Mr. Mowatt's accusation, the circumstances of his custody and his

[38]Tri. Tr., Vol. 2 of 2, Pg. 127 Lines 18-25.

conviction for unsworn falsification[39] weighed against the fact that Mr. Mowatt made self-incriminating statements while accusing the Defendant of a felony does not balance out to probable cause.

4. MR. MOWATT WAS AN UNRELIABLE INFORMANT WHO PROVIDED UNCORROBORATED INFORMATION

The Supreme Judicial Court of Maine has consistently held that corroboration of informant's reports regarding criminal activities is important especially where there are reasons to doubt the informant's veracity. [40] In the handful of cases where an informant's statement against penal interest

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[39] Tri. Tr., Vol. 1 of 2, Pg. 115 line 19-21.

[40] *State v. Dignoti*, 682 A.2d 666, 668, 670 (Me. 1996) (multiple independent informants with consistent information, including citizen informants and one who made statement against penal interest); *State v. Allard*, 674 A.2d 921, 922 (Me.1996) (corroborative monitored purchases by confidential informant and information from concerned citizen informants); *State v. Veglia*, 620 A.2d 276, 277 (Me.1993) (two confidential informants, both reliable in past, and one involved in controlled purchases, they were able to provide detail about future criminal activity that was corroborated by police); *State v. Van Sickle*, 580 A.2d 691, 693-94 (Me.1990) (informant participation in controlled purchases of illegal drugs, purchases were electronically monitored and the contraband was furnished to the police as corroboration); *State v. Haley*, 571 A.2d 831, 833 (Me.1990) (informant participation in controlled purchases of illegal drugs while under electronic monitoring by the police and the contraband was subsequently furnished to police as corroboration); *State v. Gallant*, 531 A.2d 1282, 1284 (Me.1987) (several independent confidential informants of undetermined reliability provided consistent information, officers observed over 100 people enter a drug house within 46 hours most staying only a few moments); *State v. Salley*, 514 A.2d 465, 466 (Me.1986) (informant participation in three controlled purchases of illegal drugs); *State v. Knowlton*, 489 A.2d 529, 530-31 (Me.1985) (informant statements against penal interest, statements by another police department that informant was reliable, informant's personal observation of drug activity, and informant participation in controlled purchase of cocaine). *State v. Chase*, 439 A.2d 526 (Me., 1982) (concerned citizen informant made a controlled purchase of contraband, further corroboration by observing the target apartment several times and noting lots of foot traffic surrounding visits that lasted 5 – 10 minutes.)

was used to establish probable cause this Court has *always* required or recognized significant corroboration. In *State v. Dignoti* there were multiple independent informants that gave consistent statements regarding the defendant's drug trafficking and police surveillance turned up activity highly suggestive of drug trafficking. The Court found that "the affidavit discloses that the investigating officers corroborated important facts alleged by the unnamed "concerned citizens." *State v. Dignoti*, 682 A.2d 666, 670 (Me., 1996). In *State v. Knowlton* an order to suppress was vacated because the Court found that probable cause exists where an informant, alleged to be reliable in the past, was able to corroborate his claims. The informant "specified Thanksgiving as the date when he was at defendants' apartment, and he provided specific information about sales of drugs and the place in the apartment where the drugs were kept. His purchase of drugs at defendants' apartment only hours earlier, conducted under substantial police surveillance, his willingness to turn those drugs over to the police, and the statement of the Lower Township, New Jersey, police that they had had occasion to use the informant in the past and that they had found him to be very reliable[.]" *State v. Knowlton*, 489 A.2d 529 (Me., 1985) In *Appleton* the informant was said to be reliable in the past and he performed a controlled purchase of narcotics which produced physical evidence with

which police could corroborate his information. A review of the case law shows that a statement against penal interest from an unreliable informant has never been considered an adequate basis to find probable cause in Maine. Such a ruling would be the low water mark for findings of probable cause based on informant's tips.

In *State v. Rabon* (2007) the Court took notice of the fact that even under the totality of circumstances approach when there is some good reason to doubt the veracity[41] of the informer common sense dictates that something more be offered to find probable cause: "that "something more" is frequently supplied by police corroboration of the informant's reports regarding suspicious or criminal activities by the person suspected of wrongdoing. See, e.g., *State v. Thibodeau*, 2000 ME 52, ¶¶ 3, 7, 747 A.2d 596, 598-99 (corroborating informant tip without information about veracity or basis of knowledge by analysis of utility records, and infra-red observation of apartment); *State v. Lutz*, 553 A.2d 657, 658-59 (Me.1989) (corroborating informant tip by observation of four marijuana gardens with path leading to seasonal camp and partially corroborating information from named informant that defendant resided at seasonal camp); *State v.*

[41] In *Gates* the informant's veracity was in doubt because he or she was a confidential informant. In the instant case the informer's veracity is in doubt because of his past of convictions for untrue statements to the Caribou Police Department.

Nason, 498 A.2d 252, 253 (Me.1985) (corroborating informant tip through police observation of suspicious activity at residence for eleven-day period). Indeed, in every search warrant affidavit we have addressed since Gates, the affidavit included information depicting contextually suspicious or overtly criminal activity by a suspect who was observed by someone in addition to or other than an anonymous or confidential informant". *State v. Rabon*, 2007 ME 113, 930 A.2d 268 (Me., 2007).

In *Rabon* the reason to doubt the veracity of the informant was the fact that it was a confidential informant. Here the informant was not confidential, worse he was a known unsworn falsificator who made it very clear he was looking for leniency as to his own punishment or the punishment of his fiancé. In short Mr. Mowatt was less reliable than the confidential informants in *Harris*[42] and *Appleton*[43] because his reliability was not just unknown, Mr. Mowatt was actually known to be unreliable in the past.

The Maine Supreme Judicial Court acknowledged in *State v. Knowlton*, 489 A.2d 529, 531 (Me. 1985) (quoting Gates, 462 U.S. at 230, 103 S.Ct.

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[42] In Harris the informant was confidential but his information corroborated the officer's pre-existing belief that Harris made liquor. That belief was based on the officer's previous experience of finding an illegal still under Harris's control.

[43] The affidavit for a warrant in *Appleton* states that the co-operating citizen informant had purchased LSD for them in the past, meaning he was a reliable informant. This distinguishes it from the instant case where the informant is known to be unreliable.

2317) that "*Gates* emphasized that the totality-of-the-circumstances approach "permits a balanced assessment of the relative weights of all the various indicia of reliability (*and unreliability*) attending an informant's tip." 462 U.S. at 234, 103 S.Ct. 2317. (Emphasis Added). Indeed the Supreme Court of the United States has also demanded that "[i]n determining whether an officer had probable cause the court must examine the events leading up to the arrest and decide whether the historical facts, viewed from the standpoint of an objectively reasonable police officer amount to probable cause. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The historical facts in the instant case are that the informant has a past of deliberately making untrue statements to the police. Given the totality of the circumstances simply making a statement against one's penal interest doesn't create probable cause unless such a determination is necessitated by the larger context of said statement. In fact dozens of courts have given weight to the past reliability of informants[44], it only makes sense that the

[44] *State v. Crowley*, 1998 ME 187, ¶¶ 2, 8, 714 A.2d 834, 836-37 (named informant with potentially stale first-hand information and conclusory statements by reliable informants) *State v. Ward*, 624 A.2d 485, 487 (Me.1993) (first informant, reliable in past, with report of personal observation of drug activity; second informant with report of first-hand information and attempt at monitored drug purchase); *State v. Veglia*, 620 A.2d 276, 277 (Me.1993) (two confidential informants, both reliable in past, and one involved in controlled purchases, they were able to provide detail about future criminal activity that were corroborated by police); *State v. Currier*, 521 A.2d 295, 297 (Me.1987) (informant reliable in past and informant signal of drug delivery suggesting personal observation) *State v. Knowlton*, 489 A.2d 529, 530-31 (Me.1985) (informant statements against penal interest, statements by another police department that

unreliability be recognized here as *Gates* expressly demands. In the instant case that means recognizing that Mr. Mowatt's 2011 conviction for Unsworn Falsification makes him an unreliable informant.[45]

B. THE SEARCH AND ARREST OF DEFENDANT WERE ILLEGAL

1. THE SCOPE OF THE TRAFFIC STOP WAS EXCEEDED

Article 1, sections 5 of the Maine Constitution does not permit a valid traffic stop to become justification for continued detention and questioning on other issues, once the transaction the stop was based on has been completed.[46]

In the instant case the transaction that the stop was ostensibly based on never even began. Defendant was never told that he was being pulled over for a failure to use his blinker during his arrest. In fact he was not even told why he was being arrested at all.[47] He was ordered out of his car at

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informant was reliable, informant's personal observation of drug activity, and informant participation in controlled purchase of cocaine).

[45] 2011 should not be considered too remote. It was less than two years prior to Mr. Mowatt's arrest and it is indicative of his unreliability. In Harris the Supreme Court took notice of events occurring four years prior (the discovery of the illegal still) and used them to help form a basis for probable cause.

[46] *State v. May*, 608 A.2d 772, 774 (Me.1992) (holding that police had no authority to search a defendant's wallet, found in a police cruiser, after the defendant had been validly arrested and released, such that the arrest transaction had ended); see also *State v. Garland*, 482 A.2d 139, 144 (Me.1984) (indicating that an officer cannot continue to press an investigation and detention of a person when the reason for the investigation and detention has evaporated).

[47] Tri. Tr., Vol. 2 of 2, Pg. 25 Lines 14-19.

gunpoint.[48] He was searched and no gun was found.[49] Then he was detained in the back of a police car.[50] Then his car was searched and no gun was found.[51]

Pretextual stops are not illegal so long as an officer stays within the scope of his authority. When beginning a pretextual stop an officer's authority is limited to dealing with the minor traffic infraction. Indeed the Supreme Court has been consistent on this point from the 1983 plurality opinion in *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) where the Court held that the scope of the detention must be carefully tailored to its underlying justification for the traffic stop. Addressing the infraction is the purpose of the stop, so the stop may not last longer than is necessary to effectuate that purpose, to the recent case of *Rodriguez v. United States* where it was held that "that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required

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[48] Motion to Suppress Hearing Transcript. Testimony of Officer Bell. Pg. 15 lines 19-14 and Pg. 16 line 1.
[49] Tri. Tr., Vol. 2 of 2, Pg. 18 Lines 9-15.
[50] Tri. Tr., Vol. 2 of 2, Pg. 10 Lines 10-12.
[51] Tri. Tr., Vol. 2 of 2, Pg. 21 Lines 9-16.

to complete th[e] mission' of issuing a ticket for the violation." *Rodriguez v. United States*, 135 S. Ct. 1609, 191 L. Ed. 2d 492, 83 USLW 4241 (2015). When Officer Bell pulled Defendant over for a traffic infraction he should have stayed within the scope of that interaction and dealt with the infraction. Because there was no probable cause to believe the Defendant had a gun or committed the crime of armed robbery that would justify the search incident to his arrest and none arose during the course of writing a ticket for a traffic infraction.

Officer Bell's authority may be expanded, if and only if, during the course of dealing with the pretextual offense, the officer discovers specific and articulable facts that justify an expanded scope to investigate further crimes. In Maine "[t]he scope of a policeman's inquiry and the permissibility of continuing to press the on-going investigation necessarily depend upon the continuing flow of information coming to the officer's attention after the start of the originally undertaken investigation. If the officer discovers additional evidence of possible wrongdoing, he may expand his inquiry as suggested by this new information. The converse proposition also holds true." *State v. Garland*, 482 A.2d 139, 144 (Me., 1984). (citations omitted). The legality of such stops is well summarized by *State v. Izzo*, 623 A.2d 1277 (Me., 1993). In that case an officer encountered a vehicle at a closed

gas station. The occupants were slow to roll down the window and acted suspiciously. When they left he noticed a tail light and a plate light were out on the vehicle. The officer effected a routine traffic stop for said infractions and noticed several empty beer cans in the back of the car. He also noticed that the driver appeared and smelled intoxicated.

The Court held that the officer was justified in detaining Izzo in his police car while he got identification from the passenger because: "[j]ust prior to Izzo's leaving his vehicle, Boucher became aware of facts that supported a reasonable suspicion that Izzo was operating under the influence of alcohol. He observed several beer bottles, at that time apparently empty, in the back seat of the vehicle; noticed Izzo's eyes appeared bloodshot and watery; and he smelled alcohol in the vehicle and on Izzo's breath as he was conducting a license and registration check. These observations, in conjunction with Boucher's earlier suspicions that Izzo had acted nervously during their initial conversation at the closed gasoline station, and after the Izzo vehicle was stopped, constitute 'specific and articulable facts' that reasonably warranted Boucher's suspicion that Izzo was operating under the influence. *State v. Izzo*, 623 A.2d 1277, 1281 (Me., 1993).

No one involved in the investigation of the armed robbery or Defendant's arrest had specific and articulable facts reasonably warranting a suspicion that the Defendant committed a robbery. Officer Bell did not even begin the appropriate procedure for a traffic stop. Instead he performed a high risk felony stop.[52] Immediately going beyond the scope of his authority pursuant to a pretextual stop.

2. DEFENDANT WAS SUBJECTED TO AN ILLEGAL ARREST AND THE EVIDENCE SEIZED DURING SAID ARREST OUGHT TO BE SUPPRESSED

Because Officer Bell ignored the limited scope of a pretextual stop, his search of the Defendant must be analyzed as a search incident to arrest. A careful analysis shows that said warrantless search and said warrantless arrest were both unsupported by probable cause and were illegal.

A warrantless search is per se unreasonable unless it satisfies one of the specific delineated exceptions to the warrant requirement. A warrantless search incident to an arrest is lawful only if the search is contemporaneous with the arrest *and the arrest itself is lawful.* (i.e., not wanting for probable cause). *Draper v. United States*, 358 U.S. 307 (1959);

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[52] Motion to Suppress Hearing Transcript. Testimony of Officer Douglas Bell. Pg. 12 line 4.

United States v. Robinson, 414 U.S. 218 (1973). This means that if the State, in the prosecution of a felony, seeks to justify the admission into evidence the fruits of a warrantless arrest the arrest itself must be based on probable cause. *State v. York*, 324 A.2d 758, 763 (Me. 1974). For all the reasons set forth in Section A above there was no probable cause to arrest and subsequently search the Defendant.

The fact that Officer Bell relied on the word spread by Officer Cummings that Defendant was to be arrested (presumably because Officer Cummings believed there to be probable cause) does not make the arrest legal unless there were facts and circumstances known to Officer Cummings that created probable cause. As addressed in Part A of this appeal, there were not. In fact the Supreme Judicial Court of Maine states this proposition succinctly in *State v. Parkinson* "If the arresting officers are acting on information conveyed by police transmission facilities, which by itself would not be sufficient to establish probable cause to justify the arrest, then the arrest without a warrant would be illegal, unless the State produced the evidence within the knowledge of the other members of the police team on which the radio information was based and which itself singly or in conjunction with the evidence independently gathered by the arresting officers constituted probable cause. *United States v. Vasquez*,

534 F.2d 1142, 1145 (5th Cir. 1976); *Collins v. State*, 17 Md.App. 376, 302 A.2d 693, 697 (1973)." *State v. Parkinson*, 389 A.2d 1, 9 (Me., 1978). Neither Officer Cummings by himself nor in conjunction with Officer Bell or any other members of law enforcement had evidence constituting a basis for probable cause. Ergo, Officer Bell's arrest of Defendant was illegal and all evidence flowing therefrom ought to have been suppressed at his trial.

CONCLUSION

For the reasons stated above Defendant asks this Court to overturn the Aroostook County Superior Court's August 13, 2014 order denying Defendant's Motion to Suppress and overturn Defendant's November 13, 2015 conviction for Aggravated Trafficking in Scheduled Drugs which was based on the illegal search.

Defendant bases his claim of reversible error at the trial level on the ground that his arrest by Officer Douglas Bell of the Caribou Police Department was without probable cause and in violation of his constitutional rights under the Fourth-Fourteenth Amendments to the United States Constitution 4 and under Article I, § 5 of the Constitution of Maine. 5 From that premise of an initial illegal arrest, he contends the seized drugs from his person were the "fruit of the poisonous tree" and should have been suppressed as evidence at trial. Therefore Defendant

requests that this Court overturn the ruling on the suppression order, vacate Defendant's conviction and remand this case for a new trial.

Dated at Presque Isle, Maine this 12th day of April 2016.

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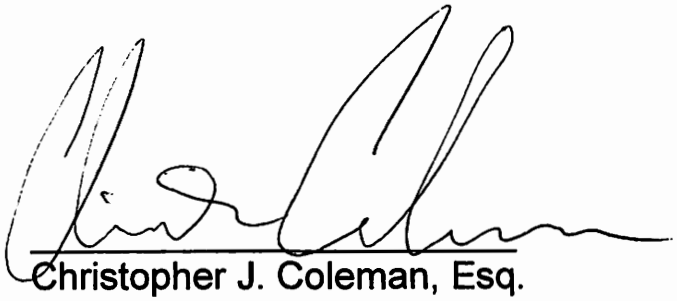
CERTIFICATE OF SERVICE

I, Christopher J. Coleman, Esq., Attorney for the Appellant in the above matter, certify that I have this day forwarded two copies of this Appellant's brief to the following party(s) by depositing in the United States Mail, postage prepaid, addressed as follows:

Todd Collins, District Attorney
Office of the District Attorney
144 Sweden Street
Caribou, Maine 04736

Dated at Presque Isle, Maine this 13th day of April, 2016.



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